

***United States Court of Appeals
for the Second Circuit***



**APPELLANT'S
BRIEF**

74-2159

To be argued by
TERENCE GARGAN

United States Court of Appeals
FOR THE SECOND CIRCUIT

Docket No. 74-2159

COMPAGNIE GENERALE TRANSATLANTIQUE,
Plaintiff-Appellant,

—against—

UNITED STATES OF AMERICA,
Defendant and Third Party
Plaintiff-Appellant,

—against—

RED STAR TOWING & TRANSPORTATION CO., INC. and TRACY TOWING
LINE, INC. and BRONX TOWING LINE CO., *in personam,*

—and—

Tugs KATHLEEN TRACY and BRONX 4,
their engines, tackle, etc., *in rem,*
Third-Party Defendants-Appellees,

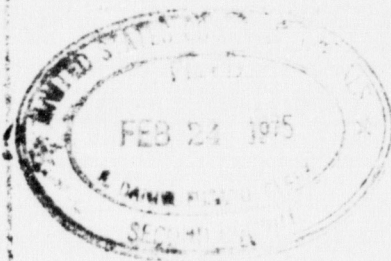
BRIEF AND APPENDIX OF DEFENDANT AND
THIRD-PARTY PLAINTIFF-APPELLANT,
UNITED STATES OF AMERICA

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**United States Court of Appeals
FOR THE SECOND CIRCUIT**

Docket No. 74-2159

COMPAGNIE GENERALE TRANSATLANTIQUE,
Plaintiff-Appellant,
—against—

UNITED STATES OF AMERICA,
*Defendant and Third-Party
Plaintiff-Appellant,*
—against—

RED STAR TOWING & TRANSPORTATION CO., INC. and TRACY
TOWING LINE, INC. and BRONX TOWING LINE CO., *in
personam,*
—and—

Tugs KATHLEEN TRACY and BRONX 4,
their engines, tackle, etc., *in rem,*
Third-Party Defendants-Appellees,

**BRIEF OF DEFENDANT AND THIRD-PARTY PLAINTIFF-
APPELLANT, UNITED STATES OF AMERICA**

Statement of the Case

This is an appeal from a judgment holding the United States solely at fault for collision damage sustained by the plaintiff, and dismissing all third-party actions.

The case was tried on the issue of liability before the Honorable Kevin T. Duffy, United States District Judge, Southern District of New York, on January 3, 1974 and a decision was filed on May 15, 1974. The decision was not reported.

Issues Presented for Review

1. Whether the District Court erred in finding the tug BRONX 4 free of negligence in the performance of its duties.
2. Whether Red Star breached the warranty of workmanlike performance of its tug assistance contract with the United States.

Statement of Facts

On August 18, 1966, the USS RALEIGH (LPD-1), a Naval vessel was shifted from the North Side of Pier 90, North River, to the South Side of the Pier. While doing so, the RALEIGH collided with the liner SS FRANCE which was moored across the slip on the North Side of Pier 88.

Captain Edward Fitzgerald, a Government pilot, was in overall charge of the movement and was assisted by two privately owned Government contracted tugs, the KATHLEEN TRACY and the BRONX 4,¹ and one Government owned tug. At the beginning of the operation, Fitzgerald ordered the Government owned tug to move "camels" from one side of the pier to the other and ordered the tug KATHLEEN TRACY to take up station at the RALEIGH's starboard bow (23a).*

¹ Red Star Towing and Transportation Co. was under contract with the United States Navy to furnish tugboats for the safe handling of Navy ships in New York Harbor. On the day of the accident, no Red Star tugs were available, and Red Star substituted the KATHLEEN TRACY and BRONX 4.

* (—2) refers to appendix attached

Because of the tug's high superstructure and the overhang of the RALEIGH's bow, the Captain of the TRACY tug declined to remain and the KATHLEEN TRACY moved away.

Pilot Fitzgerald and the RALEIGH master, Captain Wilder, discussed the situation and concluded that the BRONX 4 could be used at the bow and ordered it to that position (31a).

The ship left the pier without tug assistance, and the BRONX 4 came alongside the starboard bow and was ordered by Fitzgerald to begin pushing the bow of the RALEIGH around (23a).

The tug BRONX 4 acknowledged the order and began pushing. However, it soon became apparent that the bow was not swinging to port as expected and Captain Wilder looked over the side at the tug and saw no wake coming from its stern. The absence of a wake indicated that the tug had stopped pushing. Wilder told Fitzgerald, who then ordered the tug to comply with his initial command (29a). The tug operator, George McGuirk, expressed his unwillingness to remain under the overhang of the bow for fear of damaging his tug (34a).

Fitzgerald specifically directed McGuirk to comply with his command indicating that it could be done without damage to the tug (31a).

At this critical moment in the operation, McGuirk was relieved for lunch by Melvin Steen, the mate of the tug (38a). McGuirk never told Steen that the tug was under a "push full ahead" order and Steen took over the operation of the tug assuming that his only obligation was to put a line on the bow of the RALEIGH (38a, 39a).

When it became obvious for the second time that the tug was not doing what it was ordered to do, the pilot again ordered "push full ahead". The tug complied and the bow of the RALEIGH began swinging properly.

Just as the RALEIGH began swinging away from the moored SS FRANCE, Steen stopped pushing without signalling and backed his tug away from the RALEIGH. The RALEIGH thereafter struck a grazing blow against the liner's port side (24a, 29a).

ARGUMENT

I.

The Court below erred in exonerating the Tug BRONX 4.

The BRONX 4 violated several fundamental rules of proper navigation. It failed to carry out Pilot Fitzgerald's orders, it failed to notify Fitzgerald or sound the danger signal when it stopped pushing the first time, it failed to sound the danger signal when it abandoned the RALEIGH the second time, and the tug operators failed to properly relieve the watch by not passing on essential information.

An assisting tug has the duty to carry out, if possible, all orders given it by the pilot during the maneuver. *Lykes Bros. SS Co. v. The A.W. Whiteman*, 138 F. Supp. 725 (E.D. La 1956); *Rawls Bros. Contractor, Inc. v. U.S.*, 251 F. Supp. 47 (M.D. Fla. 1966); *Panama Canal Co. v. Sociedad De Transportes Maritimos S.A.*, 272 F.2d 726 (5 Cir. 1959). Moreover, in the case at hand, the first order given by the pilot to the tug to push full ahead was in fact acknowledged by the tug captain. Pilot Fitzgerald had the right to assume the order was being carried out after the acknowledging signal was given. See *Pure Oil Co. v. Nel-*

son, Inc., 135 F. Supp. 786 (E.D. La. 1955), *aff'd*, 233 F.2d 790 (5 Cir. 1956).

The proof further indicates that the failure of the tug to comply or warn of the non-compliance was causally related to the collision (28a, 29a).

The BRONX 4 should not be excused for reversing and backing off when it was her own non-compliance that placed her *in extremis* in the first place. *Griffin on Collision Sec. 233*.

Furthermore, there was nothing to prevent BRONX 4 from complying with the pilot's orders from the very beginning. Evidence introduced at the trial, also uncontroverted, indicates that the BRONX 4 has its highest fixed point 26' 6" above the waterline (Exh. 4 McGuirk's Deposition). The overhang at the RALEIGH's bow is 33' 9 $\frac{5}{8}$ " above the water line (Exh. 1 McGuirk's Deposition). The vertical clearance between the two vessels was in excess of 7 feet.

The evidence indicates that Fitzgerald was acting properly when he ordered BRONX 4 to the bow and that the crew of the BRONX 4 was mistaken as to the clearance.

It is respectfully submitted that BRONX 4 was operated in a negligent manner and this negligence was the proximate cause of the collision.

II.

The Court below erred in not deciding the Government's allegation of breach of warranty by Red Star.

In addition to the allegation of negligence on the part of the BRONX 4, the Government contended at the outset of this case (11a) that Red Star owed a warranty of work-

manlike performance of its towing contract to the Government. The Court below failed to reach the question, being content to find the sole cause of the accident to be pilot negligence, with no concurrent negligence on the part of BRONX 4.

However, a comprehensive determination of the Government's rights must, of necessity, include the warranty question.

If the BRONX 4 was operated negligently as discussed above, Red Star would be liable for breach of warranty. *Todd Shipyard Corp. v. Moran Towing & Trans. Co., Inc.*, 247 F.2d 626 (2 Cir. 1957). *De Rande v. Gaytime Shops Inc.*, 239 F.2d 735 (2 Cir. 1956); *Bilkay Holding Corp. v. Consolidated Iron & Metal Co.*, 330 F. Supp. 1313 (S.D.N.Y. 1971) Restatement of Agency § 212.

Moreover, even non-negligent performance of the towing contract can cast the defendant in liability for breach of warranty. *Fairmont Shipping Corp. v. Chevron International Oil Co.*, — F.2d — (2 Cir. 1975), decided February 4, 1975.

Red Star was obligated under the towing contract to furnish tugs properly manned, fitted and equipped for the use intended.

It is not being suggested, that Red Star become an insurer against accidents. However as Judge Mansfield points out in his dissenting opinion in *Fairmon*, *supra*, "the contract obligated the tugs to render such assistance as could reasonably be expected of them under all of the circumstances. . . ."

Under the warranty of workmanlike performance test, the tug company must render that type of service reasonably

to be expected of towers similarly situated. The service rendered must at least reflect that level of skill and judgment exhibited by the towing community in general.

Under this test, there can be little doubt that the performance by the BRONX 4 lacked that degree of skill and judgment possessed by the towing community in general.

This is an issue separate from the negligence.

In addition, Red Star's obligation was to furnish tugs properly manned, fitted and equipped to perform the work. The record is clear and the Court found that the BRONX 4 "was encountering the same difficulty with the overhead or flare of the RALEIGH'S prow" [as the KATHLEEN TRACY had encountered]. Thus the equipment furnished was not reasonably fit for its intended use.

The warranty question should not have been disregarded.

III.

The negligence of Pilot Fitzgerald, if any, does not preclude indemnity for breach of warranty.

In *Hurdich v. Eastmount Shipping Corp.*, 503 F.2d 397 (2 Cir. 1974), this Court outlined the type of conduct which will preclude the right of indemnity for the breach of warranty.

The Court points out (pg. 401) that "liability should fall upon the party best situated to adopt preventative measures and thereby reduce the likelihood of injury" citing *Italia Societa per Azione di Navigazione v. Oregon Stevedoring Co.*, 376 U.S. 315, 324 (1964).

Applying this test to the circumstances here, it is clear that Red Star was so situated that it, rather than Pilot Fitzgerald, was best able to eliminate the errors which caused the collision.

Red Star had the contractual obligation of dispatching tugs capable of working safely under the bow. Red Star had the contractual obligation of instructing the tug operator of the clearance rather than having them rely on "seamen's eye" to measure heights.

Red Star, through its agent, Bronx Towing, had the contractual obligation to perform the towing in a workmanlike manner which includes,

- (a) following the pilot's orders
- (b) signalling when unable to comply with the orders
- (c) relieving the watch in such a way that the oncoming operator is informed of the pilot's prior order.

Moreover, if Fitzgerald was negligent to some extent, which does not appear to be the case under the facts, that alone will not bar the plaintiff from recovering for breach of warranty of workmanlike performance. As the Court in *Fairmont, supra*, points out (pg. 1640)

"Mere concurrent fault is not enough; there must be 'active hindrance.' *Alvanese v. N.V. Nederl. Amerik Stoomv.Maats*, 347 F.2d 481, 484 (2nd Cir), rem'd on other grounds, 382 U.S. 283 (1965)."

There was no such hindrance here.

The evidence presented at trial clearly establishes a finding of negligence on the part of the BRONX 4 and a breach of the warranty of workmanlike performance on the part of Red Star with no active hindrance on Fitzgerald's part.

The District Court's finding of sole Government responsibility for the collision is an erroneous determination as a matter of law, *Mamiye Bros. v. Barber SS Lines, Inc.* 360 F.2d 774 (2 Cir. 1966), and Red Star is liable to the United States for indemnity.

CONCLUSION

For the foregoing reasons, the judgment of the District Court should be reversed and judgment in favor of the Government should be entered against Red Star and BRONX 4.

Respectfully submitted,

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APPENDIX



United States District Court

SOUTHERN DISTRICT OF NEW YORK

COMPAGNIE GENERALE TRANSATLANTIQUE,
Plaintiff-Appellant,
—against—

UNITED STATES OF AMERICA,
Defendant and Third-Party
Plaintiff-Appellant,

RED STAR TOWING & TRANSPORTATION CO., INC. and TRACY
TOWING LINE, INC. and BRONX TOWING LINE CO., *in*
personam,

—and—

Tugs KATHLEEN TRACY and BRONX 4,
their engines, tackle, etc., *in rem,*
Third-Party Defendants-Appellees.

Docket Entries

<i>Date</i>	<i>Proceedings</i>
Jul 11-68	Filed complaint and issued summons.
Jul 22-68	Filed summons with marshal's ret. Served U.S.A. by Mr. Lee, Civ. Div. U.S. Attys. Office and by certified mail to Atty. Genl., Washington, D.C. Receipt #557038 on 7/12/68.
Sept. 12-68	Filed third-party complaint and issued third-party summons.
Sept. 12-68	Filed ANSWER to complaint. USA

*Docket Entries**Date**Proceedings*

Sept. 16-68—Filed stipulation and order extending defendant's time to answer complaint to 9/20/68. Herlands, J.

Sept. 26-68—Filed 3rd pty summons & return, service as follows:

Red Star Towing & Transportation Co. Inc. by
M. Koch 9-23-68

Bronx Towing Line Co. by E. Iorio 9-19-68

Tracy Towing Line Co. Inc. by Mr. Griffin 9-13-68

Oct. 29-68—Filed ANSWER to third-party complaint.—F&M

Oct. 29-68—Filed ANSWER to complaint.

Nov 12-68—Filed 3rd pty deft's (Trach Towing Line, Inc., et ano) notice to take deposition of deft.

Nov 12-68—Filed claim of W.J.T. Towing Line, Inc., as owner of the tug KATHLEEN TRACH

Nov 12-68—Filed 3rd pty deft's (Trach Towing Line, Inc., et ano.) ANSWER to complaint & 3rd pty complaint
BEJ&H

Nov. 26-68—Filed Notice of taking Deposition.

Jun 27-69—Filed Pltffs notice to take deposition of Deft and third-party Pltff.

Jun 27-69—Filed Notice of taking Deposition of 3rd pty. deft. Tracy Towing Line Inc. and W.J.T. Towing Line, Inc. by the Master.

Jun 27-69—Filed Notice of taking Deposition of 3rd pty. deft. Bronx Towing Line Co. by the master.

Dec. 16-69—Filed 3rd. pty. deft's ANSWER to complaint.
K&BMR&

Docket Entries

<i>Date</i>	<i>Proceedings</i>
Apr. 27-70—	Filed plttf's NOTE OF ISSUE & statement of readiness.
May 18-70—	Filed order purs. to cal. rules 6 and 13. Sugarman, <i>Ch.J.</i>
May 21-70—	Filed thrd part. deft. Tracy Towing, et al. designation of trial counsel.
May 22-70—	Filed deft. and third-party plttf's designation of trial counsel.
May 22-70—	Filed third-party deft. Red Star Towing designation of trial counsel.
May 25-70—	Filed 3rd party deft. Bronx Towing designation of trial counsel.
Nov. 25-70—	Filed plttf's designation of trial counsel.
Nov. 25-70—	Filed plttf's memorandum of law in support of his motion.
Nov. 25-70—	Filed affidavit of Michael J. Pangia, in response to motion.
Nov. 25-70—	Filed Plttf's Affdvt & notice of motion granting leave to file an amended complaint.
Nov 25-70—	Filed Memo Endorsed on motion to amend complaint filed this day, "9L and motion to file amended complaint granted. So Ordered: Murphy, J." (mailed notice)
Dec. 7-70—	Filed plttf's amended complaint.
Dec. 14-70—	Filed deft's Red Star Towing ANSWER to amended complaint. McH,H,

Docket Entries

<i>Date</i>	<i>Proceedings</i>
Jan. 15-71	—Filed summons & return: Served W.J.T. Towing Line by M. Griffin, Secy. on 12-18-70.
Jan. 28-71	—Filed ANSWER of Tracy Towing Line & W.J.T. Towing Line, to cross-claim. BEJ&H.
Jan. 28-71	—Filed ANSWER to amended complaint of Tracy Towing Line & W.J.T. Towing Line. BEJ&
Mar 14-72	—Filed USA's pre trial memorandum
Mar 14-72	—Filed defts' Tracy Towing Line Inc. & WJT Towing Line Inc. pre trial memorandum
Mar 14-72	—Filed third-party deft Red Star Towing & Transportation Co. pre trial memorandum
Mar 14-72	—Filed 3rd pty. defts' Bronx Towing Line Co. & Tug Bronx 4 pre trial memorandum
Mar 14-72	—Filed plttf's pre trial memorandum
Mar 15-72	—Filed Consent Pre Trial Order—So ordered—Lasker, J.
Apr 26-72	—Filed plttf's notice to take deposition of Capt. Belanger on 5-5-72
Dec. 7-73	—Pre-trial conference held—DUFFY, J.

Docket Entries

- | <i>Date</i> | <i>Filings—Proceedings</i> |
|--------------|---|
| Jan. 3-74— | Before DUFFY, J. non-jury trial begun as to issue of liability only. Defts. Tracy Towing Line Inc., Kathleen Tracy and W.J.T. Towing Line, Inc., in personam—discontinued. So ordered. Briefs to be submitted by 2-4-74. |
| Jan. 3-74— | Trial concluded. Judge's decision—reserved. |
| March 26-74— | Filed deft. U.S.A. post-trial brief. |
| May 16-74— | Filed transcript of record of proceedings dated 1-3-74 |
| May 16-74— | Filed deft. & third-pty deft. Red Star Towing & Transportation Co. post trial brief. |
| May 16-74— | Filed defts. and third-pty defts. Bronx Towing Line, Inc. and Tug Bronx 4 brief. |
| May 16-74— | Filed plttf's post trial memorandum. |
| May 16-74— | Filed Opinion #40709—I find that the third-party complaint against the tug Bronx 4 must be dismissed. This in turn requires the dismissal of the third-pty complaint against both of the remaining third-pty defts. The plttf. shall recover all of its damages from the deft. United States of America. An appropriate order will enter on 10-days notice. DUFFY, J. (m/n) |
| June 5-74— | Filed transcript of record of proceedings dated 1-3-74 |
| June 26-74— | Filed Judgment—ordered that the plttf. Compagnie Generale Transatlantique recover of the deft. United States of America all of its provable damages, etc., without interest—that the complaint and third-party complaint against defts. and third-pty defts. Red Star Towing & Transportation Co., Inc., Tracy Towing Line Co. Inc., Bronx Towing Line Co., Inc. and the |

Docket Entries

Date	Filings—Proceedings
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tug Kathleen Tracy, Bronx 4 in rem, and W.J.T. Towing Line, Inc. are dismissed—and that in the event the plttf. and deft. United States of America are unable to agree on as to provable damages, either party may apply to this Court as indicated. DUFFY, J.

Judgment entered 6-26-74 Clerk Ent. 6-27-74 (m/n)

Aug. 20-74—Filed deft. & third-pty plttf. United States of America notice fo appeal from judgment entered on 6-26-74, in so far as the judgment dismisses the third-party complaint of the United States against Red Star Towing & Transportation Co., Inc., Bronx Towing Line Co., *in personam*, and the Bronx 4, her engines, tackle, etc. *in rem*. Copies mailed to:

Hill, Betts & Nash—Martin & Ryan and McHugh, Heckman. Entered 8-21-74

Aug. 23-74—Filed plttf's notice of appeal from judgment entered on 6-26-74 in so far as the judgment dismisses the third-pty complaint of the U.S. against Red Star Towing & Transportation Co., Inc., Bronx Towing Line Co., *in personam* and the BRONX 4, her engines, tackle, etc. *in rem*. Copies mailed to: McHugh, Heckman, Smith & Leonard—U.S. Atty.—Bigham, Englar, Jones & Houston and Krisel, Halberg & Beck. Ent. 8-28-74.

Aug. 27-74—Filed consent judgment on damages—Judgment #74,707—ordered that plttf. Compagnie Generale Transatlantique, recover of and from the United States of America the sum of \$53,000, without interest but which sum includes costs of the within action. DUFFY, J. Judgment entered 8-28-74—Clerk.

Docket Entries

<i>Date</i>	<i>Filings—Proceedings</i>
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Sept. 30-74—Filed stip & order that the time of deft. and third-pty plttf., United States of America, to transmit the record on appeal be extended to 11-12-74. So ordered—DUFFY. J.

Nov. 8-74—Filed notice that the record on appeal has been certified and transmitted to the USCA on 11-8-74

Nov. 8-74—Filed stipulation designating of exhibits to be transmitted to U.S.C.A.

Dec. 13-74—Filed satisfaction of Judgment #74.707.

Third-Party Complaint

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

IN ADMIRALTY

68 Civil 2854

COMPAGNIE GENERALE TRANSATLANTIQUE,

Plaintiff,

—against—

UNITED STATES OF AMERICA,

Defendant and Third-Party Plaintiff,

—against—

RED STAR TOWING & TRANSPORTATION CO., INC., and TRACY
TOWING LINE, INC., and BRONX TOWING LINE CO., *in*
personam,

—and—

Tugs KATHLEEN TRACY and BRONX 4,
their engines, tackle, etc. *in rem,*

Third-Party Defendants.

AS AND FOR A FIRST CAUSE OF ACTION,
THIRD-PARTY PLAINTIFF ALLEGES
UPON INFORMATION AND BELIEF:

1. This is a negligence and breach of contract and warranty case of admiralty and maritime jurisdiction, as hereinafter more fully appears, and within the meaning of Rules 9(h) and 14(c) of the Federal Rules of Civil Procedure.

Third-Party Complaint

2. At all times hereinafter mentioned the United States of America was, and still is, a corporate sovereign and owner of the undocumented public vessel **USS RALEIGH (LPD-1)**.

3. At all times hereinafter mentioned **KATHLEEN TRACY** and **BRONX 4** were, and still are, tugboats respectively owned, operated or otherwise controlled by Tracy Towing Line, Inc. and Bronx Towing Line Co., and each vessel is, or during the pendency of process herein will be, within this district and within the jurisdiction of this Honorable Court.

4. At all times hereinafter mentioned Red Star Towing & Transportation Co., Inc. was, and still is, a corporation having its principal place of business at 19 Rector Street, New York, N.Y., located and doing business within this district and in the business of providing tugboat assistance to vessels in the Port of New York, and owning, operating or otherwise controlling various tugboats and other vessels.

5. At all times hereinafter mentioned, Tracy Towing Line, Inc. was, and still is, a corporation having its principal place of business at 1 Broadway, New York, N.Y. located and doing business within this district and in the business of providing tugboat assistance to vessels in the Port of New York, and owning, operating or otherwise controlling various tugboats and vessels, including the Tug **KATHLEEN TRACY**.

6. At all times hereinafter mentioned, Bronx Towing Line Co. was, and still is, a corporation, partnership or other legal entity having its principal place of business at 1740 Broadway, New York, N.Y., located and doing business within this district and in the business of providing tugboat assistance to vessels in the Port of New

Third-Party Complaint

York and owning, operating or otherwise controlling various tugboats and vessels including the Tug BRONX 4.

7. At all material times Red Star Towing & Transportation Co., Inc. and third-party plaintiff were parties to a contract, designated No. N00140 66 C 0538, for the rendition of tugboat services by said Red Star Towing & Transportation Co., Inc. to vessels owned by third-party plaintiff.

8. At all pertinent times U.S.S. RALEIGH was, and still is, a public vessel of the United States owned and operated by third-party plaintiff.

9. On or about July 12, 1968, a complaint, in which Compagnie Generale Transatlantique was named as plaintiff, and the third-party plaintiff was named as defendant, was served on third-party plaintiff. In said complaint, a copy of which is attached hereto, plaintiff seeks to recover \$75,000.00 as damages because of injuries alleged to have been sustained by it as owner of SS FRANCE in respect of an alleged striking of said vessel by USS RALEIGH on or about August 18, 1966 while SS FRANCE was moored at Pier 88, North River.

10. On said date and at the time of the alleged striking, USS RALEIGH was shifting from a berth on the north side of Pier 90, North River, to a berth on the south side of that pier. Pursuant to the aforesaid contract, Red Star Towing & Transportation Co., Inc. had provided the tugs KATHLEEN TRACY and BRONX 4 to assist USS RALEIGH.

11. If plaintiff was injured as alleged in the complaint, which is expressly denied, such injuries arose or grew out of the individual or joint and several faulty performance

Third-Party Complaint

or omissions of third-party defendants Red Star Towing & Transportation Co., Inc.; Tracy Towing Line, Inc.; Bronx Towing Line Co.; Tug KATHLEEN TRACY; and Tug BRONX 4, in breach of their express and implied contractual obligations and in breach of their express and implied warranties of fitness for intended purposes and of safe and workmanlike services and, therefore, third-party defendants and each of them are and is liable to third-party plaintiff for damages foreseeably resulting from each such breach.

12. By reason of the premises, Red Star Towing & Transportation Co., Tracy Towing Line, Inc., Bronx Towing Line Co., and the tugs KATHLEEN TRACY and BRONX 4 may be liable to third-party plaintiff by way of remedy over for indemnity and are necessary parties to this action and should be proceeded against herein under Rule 14 of the Federal Rules of Civil Procedure, as revised, in order that all claims and issues arising from the incident alleged in the complaint and in this third-party complaint may be disposed of in the course of this suit.

AS AND FOR A SECOND CAUSE OF ACTION,
THIRD-PARTY PLAINTIFF ALLEGES
UPON INFORMATION AND BELIEF:

13. Each and every allegation contained in Paragraphs 1 through 10, inclusive, is repeated and realleged with the same force and effect as if fully set forth here.

14. If plaintiff, was injured as alleged, which is expressly denied, such injuries arose or grew out of the failure of third-party defendants Red Star Towing & Transportation Co., Inc., Tracy Towing Line, Inc., and Bronx Towing Line Co., individually or jointly and sev-

Third-Party Complaint

erally, to provide tugboats reasonably suited and properly equipped, manned and fitted for the intended service, and to the failure of the Tug BRONX 4 and her crew and master to properly perform the duties owing to USS RALEIGH; to the said tug's abandonment of its station; and to its failure to properly carry out orders given by the pilot aboard USS RALEIGH.

15. By reason of the premises, Red Star Towing & Transportation Co., Inc.; Tracy Towing Line, Inc.; Bronx Towing Line Co.; and the tugs KATHLEEN TRACY and BRONX 4 are necessary parties to this action and should be proceeded against herein under Rule 14 of the Federal Rules of Civil Procedure, as revised, in order that all claims and issues arising from the incident alleged in the complaint and in this third-party complaint may be disposed of in the course of this suit.

16. By reason of the premises the said third-party defendants each may be wholly or partly liable either to the plaintiff or to the third-party plaintiff by way of remedy over, contribution, or otherwise on account of the same occurrence or series of occurrences.

WHEREFORE, third-party plaintiff demands:

1. That third-party defendants Red Star Towing & Transportation Co., Inc., Tracy Towing Line, Inc. and Bronx Towing Line Co., each be summoned to answer both this third-party complaint and the plaintiff's complaint, and that warrants issue for the arrest of Tug KATHLEEN TRACY, her engine, tackle, etc., and Tug BRONX 4, her engine, tackle, etc.; and

2. That the complaint be dismissed as to the third-party plaintiff and that, if the Court finds the plaintiff entitled to recover, then that all such recovery be had

Third-Party Complaint

against the said vessels, Red Star Towing & Transportation Co., Inc., Tracy Towing Line, Inc., and Bronx Towing Line Co., individually or jointly and severally, and that judgment of condemnation and sale be entered against the property arrested and attached herein, and the amount of plaintiff's claim with interest and costs, if awarded, be paid out of the proceeds thereof; and

3. That, if third-party plaintiff be found liable to plaintiff, a judgment be entered against third-party defendants holding them individually or jointly and severally liable for the entire amount that third-party plaintiff is found liable to pay plaintiff, including interest and costs, along with the costs incurred by third-party plaintiff, or holding third-party defendants, either individually or jointly and severally, liable for contribution, and that judgment of condemnation and sale be entered against the property arrested and attached herein, and the amount of third-party plaintiff's judgment against third-party defendants or any of them, including interest, be paid out of the proceeds thereof; and

4. That third-party plaintiff have such other, further or different relief as may be just and proper.

ROBERT M. MORGENTHAU
United States Attorney

LOUIS E. GRECO
Attorney in Charge
Admiralty & Shipping Section
Department of Justice
26 Federal Plaza, Suite 4048
New York, N. Y. 10007
Attorneys for U.S.A.

By: PETER MARTIN KLEIN

(Verified 9/11/68).

Opinion of the Court

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

68 Civ. 2854

COMPAGNIE GENERALE TRANSATLANTIQUE,
Plaintiff,

—against—

UNITED STATES OF AMERICA,
Defendant and Third-Party Plaintiff,

—against—

RED STAR TOWING & TRANSPORTATION CO., INC., TRACY TOW-
ING LINE, INC. and BRONX TOWING LINE CO., INC., *in*
personam, the tugs KATHLEEN TRACY and BRONX 4,
their engines, tackle, etc., *in rem*,
Defendants and Third-Party Defendants,

—and—

W.J.T. TOWING LINE, INC., *in personam*,
Defendant.

APPEARANCES:

HILL, BETTS & NASH, Esqs.
Attorneys for the Plaintiff,

By: EDWARD H. DUGGAN, JR., Esq.
Of Counsel

Opinion of the Court

HON. PAUL J. CURRAN
United States Attorney
For the Government

By: GILBERT S. FLEISCHER, Esq.
Attorney in Charge, Admiralty & Shipping Section,
Department of Justice
TERRANCE GARGAN, Esq.
Assistant United States Attorney
Of Counsel

MARTIN & RYAN, Esqs.
Attorneys for Bronx Towing Line and
Tug Bronx 4

By: EDWARD J. RYAN, Esq.
Of Counsel

FOLEY & MARTIN, Esqs.
Attorneys for Red Star Towing & Transportation
Co., Inc.

By: STEPHEN J. BUCKLEY, Esq.
Of Counsel

KEVIN THOMAS DUFFY, *D.J.*

On August 18, 1966, the S.S. FRANCE, owned by plaintiff, was properly moored along the north side of Pier 88, North River, New York, when her port side was struck by the moving U.S.S. RALEIGH, owned by the defendant United States of America. At the time of the collision, the RALEIGH was in the process of shifting her berth from the north side of Pier 90 and was entering the slip between Pier 88 and Pier 90 and attempting to moor port side to the south side of Pier 90.

Opinion of the Court

The defendant Red Star Towing & Transportation Co., Inc. (hereinafter referred to as "Red Star") at the time was providing tug service to United States vessels in New York Harbor. Red Star made arrangements for the tugs BRONX 4 and KATHLEEN TRACY to assist the RALEIGH in shifting her berth in the North River on the day in question. In addition to the two tugs that Red Star provided, there was a United States Navy tug in the immediate vicinity, making three tugs available for the docking of the RALEIGH.

A United States Navy docking pilot, Edward Fitzgerald, was on the bridge of the cruiser RALEIGH along with the ship's master, Captain Wilder, during the entire operation. At the start of the operation the North River was almost at flood tide with a current of about one and one-half knots at midstream.

The operation as originally contemplated was to have one tug tie up to the starboard bow and assist the RALEIGH to undock, to have one tug near the aft "in case he was needed" while the third tug moved the camels from one side of the pier to the other. (A camel is a grouping of timbers intended to fend a ship off from the pier.) The KATHLEEN TRACY was originally ordered to make fast to the starboard bow of the ship, but was unable to do so because of the radical flare or overhang of the RALEIGH. The KATHLEEN TRACY was then ordered to move the camels, and the RALEIGH cast off her six mooring lines and moved out into the stream under her own power.

During the undocking operation, the BRONX 4 was ordered to assist the RALEIGH at the starboard in place of the KATHLEEN TRACY. The ship was underway at the time the BRONX 4 arrived at the bow of the ship. Apparently the BRONX 4 tried to put a line on the RALEIGH at this point but was unable to do so since the

Opinion of the Court

RALEIGH'S bits are recessed in its hull. Moreover, the tug was encountering the same difficulty with the overhang or flare of the RALEIGH'S prow. The tug's master informed the docking pilot that he could not tie up to the RALEIGH, and the pilot said, "The hell you can't." The tug then tried to comply but did not succeed. At the time there was no radio contact between the vessels, and most communication was by whistle.*

Because of the overhang, the tug dropped back from the bow to the next bitt on the RALEIGH but was unable even there to fasten a line. The docking pilot gave the whistle signal for the tug to go full ahead. The tug complied, and the pilot gave another whistle signal for the tug to go full ahead.

During the time these maneuvers were being executed, the RALEIGH was under power heading into the slip. At the start of this run toward the south side of Pier 90 (at 1203 hours) the pilot ordered port engine ahead two-thirds and right full rudder. At approximately this time the pilot ordered the BRONX 4 to push on the starboard bow, which order the tug apparently tried to obey. At 1204 hours the rudder was brought amidship. According to Captain Wilder, the master of the RALEIGH, this order was given because the bow of his ship was headed toward the S.S. FRANCE. At 1205 hours the pilot ordered left 20° and left full rudder but did not order the port engine stopped until after the order for left full rudder. Captain Wilder was just about to relieve the pilot of command when the pilot finally ordered port engine backfull. The final order did not effectively change the direction of the RALEIGH until at 1206 hours contact was made between

* The efficacy of whistle signals has long been recognized. See, e.g., *The Joseph Johnson v. McCord*, 76 U.S. (9 Wall.) 146 (1870).

Opinion of the Court

the cruiser and the FRANCE. Just before the RALEIGH struck the FRANCE, the BRONX 4 backed off the RALEIGH in an attempt to save herself and her crew.

Plaintiff bases its suit against the defendant United States on the theory of negligence. The government, in turn, alleges that the tugboats and their owners were negligent. There is no doubt that, unless the accident was inevitable, which does not appear to be the case, the innocently moored FRANCE is entitled to recover. *The Oregon*, 158 U.S. 186 (1895); *Dahlmer v. Bay State Dredging & Contracting Co.*, 26 F.2d 603 (1st Cir. 1928). The question is who is to bear responsibility. The government claims that the third-party defendants, Red Star, The Bronx Towing Line Co., Inc. and its vessel the BRONX 4, are responsible at least in part for the damage. The case against third-party defendants W.J.T. Towing Line, Inc., Tracy Towing Line, Inc. and the KATHLEEN TRACY was dismissed on consent of all parties at the beginning of the trial.

The negligence of the RALEIGH is beyond dispute in my opinion. Even the master of the RALEIGH considered relieving the pilot when he failed to give the proper orders to bring the cruiser into the slip. A more difficult problem, however, is presented by the allegation of responsibility on the part of the BRONX 4 and its owner. Considering all of the evidence, I have concluded that the BRONX 4 was not responsible for the damage to the FRANCE. The erratic and seemingly thoughtless commands of the Navy pilot who was directing the entire operation almost crushed the tug BRONX 4 in between the RALEIGH and the FRANCE. The fact that the BRONX 4 backed off before that could happen is not evidence of negligence but rather of good seamanship and concern for the lives of the crew of the tug. Even if the tug BRONX 4 did not put a line on the RALEIGH, that cannot be assessed as negligence

Opinion of the Court

against the tug. The carefree way that the RALEIGH was undocked and the fact that she remained underway at all times during the operation made it impossible for the tug to properly tie onto the ship.

Accordingly, I find that the third-party complaint against the tug BRONX 4 must be dismissed. This in turn requires the dismissal of the third-party complaint against both of the remaining third-party defendants.

The plaintiff shall recover all of its damages from the defendant United States of America. An appropriate order will enter on 10 days notice.

/s/ KEVIN THOMAS DUFFY
U.S.D.J.

Dated: New York, New York
May 15, 1974.

Judgment

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

68 Civ. 2854

(K.T.D.)

COMPAGNIE GENERALE TRANSATLANTIQUE,
Plaintiff,

—against—

UNITED STATES OF AMERICA,
Defendant and Third-Party Plaintiff,

—against—

RED STAR TOWING & TRANSPORTATION CO., INC., TRACY TOW-
ING LINE, INC. and BRONX TOWING LINE CO., INC., *in*
personam, the tugs KATHLEEN TRACY and BRONX 4,
their engines, tackle, etc., *in rem*,
Defendants and Third-Party Defendants,

—and—

W.J.T. TOWING LINE, INC., *in personam*,
Defendant.

This action having come on for trial before this Court on January 3, 1974 and the issues of liability having been duly tried, and an opinion having been duly rendered on May 15, 1974.

IT IS ORDERED AND ADJUDGED that the plaintiff Compagnie Generale Transatlantique recover of the defendant United States of America all of its provable damages re-

Judgment

sulting from this collision, without interest, and it is further,

ORDERED that the complaint and third-party complaint against defendants third-party defendants Red Star Towing & Transportation Co., Inc., Tracy Towing Line Co., Inc., Bronx Towing Line Co., Inc. and the tug, KATHLEEN TRACY, BRONX 4 in rem, and W.J.T. Towing Line, Inc. are dismissed, and it is further,

ORDERED that in the event the plaintiff and defendant United States of America are unable to agree on as to provable damages, either party may apply to this Court on 15 days notice for a hearing before a Judge, Magistrate, or Commissioner to ascertain and compute the damages in accordance with the rules and practice of this Court.

Dated: New York, New York
June 20th 1974

s/ KEVIN THOMAS DUFFY
U. S. D. J.

Judgment Entered—6/26/74

s/ RAYMOND F. BURGHARDT

Clerk

Statement by Edward S. Fitzgerald

Statement by EDWARD S. FITZGERALD. "COMNAV-BASE DOCKING PILOT" in connection with the collision with passenger liner FRANCE, 18 August 1966 Pier 90 North River, New York

Thursday, August 18th, I boarded the RALEIGH (LPD-1) at 1100 moored on the north side of Pier 90 bow out inner berth.

There were three tugs assigned, the YTM-753, Kathleen Tracey and the Bronx #4. I borrowed a walkie-talkie from Red Star Towing Co. on Wednesday, August 17th to use in the docking of the RALEIGH on August 17th with Red Star tugs assisting. Red Star tugs were to assist the shifting RALEIGH. I asked Red Star to let me have the walkie-talkie for this job. On Thursday morning there were no Red Star tugs available. This was the reason I obtained the walkie-talkie. Bronx #4, a 1600 H.P. tug and the KATHLEEN TRACY reported instead of Red Star tugs.

I gave orders through the Walkie Talkie to the KATHLEEN TRACY to get head on to the starboard bow of the RALEIGH before leaving Pier 90. To get two lines up on the starboard bow of the RALEIGH and work slow ahead. I tried to talk to the BRONX #4 by radio but had no communications with the tug. I then gave him an order by word of mouth from the starboard side of the bridge to stand by aft and when the stern of the ship cleared the pier for the BRONX #4 to take one L.P.D. camel around to the south side. At 1140 when we were about to leave the pier the TRACY tugs orders were to be working dead slow ahead. I gave orders to let Nos. 1, 4, 5, 6 lines go from the pier and hold Nos. 2 and 3. I then walked from the port side of the bridge to the starboard side to give the TRACY tug an order to back. I looked over the side and I saw that the TRACY tug did not have a line on the ship. I said Capt get a line up as we are waiting for you. The TRACY tug replied back that he

Statement by Edward S. Fitzgerald

could not work the bow and he would not stay there under the bow. At this time I had only two lines from the RALEIGH Nos. 2 and 3 to the pier.

I then gave the KATHLEEN TRACY orders to stand by aft to shift the camel around to the south side and to give the BRONX #4 orders to come up on the starboard bow and put a line up on the ship.

I started out from the pier without any tugs, as my stern had started to come away from the pier.

When out in the stream I had the BRONX tug push on the starboard bow to push the bow down river to the southerly wind and flood tide about 1.5 knots. When I was headed south waiting for the YTM-753 and the TRACY tug to complete the shifting of the camels—the BRONX tug left the ship with out orders. I blew my whistle "Police type" for him to come back alongside and put up a line on the starboard bow. He took station on the starboard side just forward of the bridge. I had the ship in good position to start into the ship. I blew my mouth whistle for the BRONX #4 to push full ahead on the starboard bow so as to push the RALEIGH towards the southside of Pier 90 and away from the S.S. FRANCE which was moored on the north side of Pier 88. The BRONX #4 acknowledged the order by the tugs whistle. I looked over the side and saw that the tug was not pushing hard enough so I again blew for him to push full ahead which the tug acknowledged. I looked forward and saw the RALEIGH moving slowly away from the FRANCE. I was on the starboard side of the bridge and looked down and saw the BRONX #4 backing away from the RALEIGH out into the stream as we were entering the ship. If the BRONX tug had a line up on the ship or in one of the dutch ballards and pushed on a 90° angle the tug could have pushed the bow away from the FRANCE. With the BRONX tug backing away from the bow the starboard bow

Statement by Edward S. Fitzgerald

of the RALEIGH although swinging left slowly came in contact and grazed the side of the FRANCE.

I could not see if the BRONX tug had a line on the RALEIGH due to the life raft racks extending over the ships side.

Had I known that the tug had no line on the RALEIGH I would not have attempted to proceed in with the ship. From my past experience I know the tug with 1600 H.P. could have pushed the RALEIGH toward Pier 90 at the forward draft was 18'. After finishing the RALEIGH I boarded the ROCKBRIDGE (APA-228) off Pier 90 at 1315 and proceeded south side of Pier 90 outer berth about 30 feet astern of the RALEIGH without incident—finishing at 1335 before the FRANCE sailed.

I had radio contact with Red Star docking the ROCKBRIDGE which I assumed I would have in shifting the RALEIGH. Had I had radio contact with the BRONX tug I do not believe this accident would have happened.

Wind—SW 7 MPH

Flood tide

N.R., H.W. slack 1302

Weather—Clear

EDWARD S. FITZGERALD

Pilot

NOTE:

Total amount of ships I have handled since being civilian navy pilot without incidents

Dec 18th—1963

Dec 31 —1963—26

1964—400

1965—453

Aug 18th—1966—208

1087 ships

Excerpts from Transcript

Deposition of Tracy H. Wilder

IT IS HEREBY STIPULATED AND AGREED by and among the attorneys for the respective parties hereto that the signing, sealing, filing, and certification of the transcript of the within deposition be, and the same hereby are, waived.

IT IS FURTHER STIPULATED AND AGREED that all objections, except as to the form of the questions, are reserved to the trial of this action.

TRACY H. WILDER, having been first duly sworn by the Notary Public, was examined and testified as follows:

Examination by Mr. Duggan:

Q. Would you state your name, please, sir? A. Captain Tracy H. Wilder, U.S. Navy.

Q. Your address? A. 6943 Elizabeth Drive, McLean, Virginia.

Q. By whom are you employed? A. U.S. Navy.

Q. How long have you been in the Navy? A. 25 years.

Q. Will you tell us, briefly, what sort of duty (4) assignments you have had during that period? A. I started out in the Navy as a junior officer on the battleship NORTH CAROLINA, through World War II.

From there to a destroyer, where I served 18 months; then to an icebreaker for 18 months; then I served as aide to Cruiser-Destroyer Force Commander, Atlantic Fleet.

Then I was executive officer of a destroyer, and then taught three years at Rensselaer Polytechnic Institute and went to the Air Force Staff College.

Then I had command of a destroyer for 27 months, and then I was executive assistant to the Chief of Staff for the Supreme Allied Commander, Atlantic.

Then I attended a year with the State Department Senior Seminar in Foreign Policy, at which time I took

*Excerpts from Transcript
Deposition of Tracy H. Wilder*

command of the U.S.S. RALEIGH and was in command for 18 months, and am currently serving in the Joint Chiefs of Staff in Washington.

Q. It sounds like you have had a little sea time. A. A little bit.

Q. Captain, during what period did you serve as commanding officer of the RALEIGH? A. From 1966 to 1967.

Q. Were you the commanding officer on August 18-19 of 1966? (5) A. I was.

Q. At that time, where was the RALEIGH located? A. On the 18th of August we were in New York Harbor at Pier 90.

Q. How long had you been there? A. One day.

Q. When had the vessel arrived in New York? A. On the 17th of August.

Q. At what time of the day on the 17th did she arrive? A. About noon.

Q. When the vessel arrived in New York Harbor, where did it go? Where did it moor, what anchorage? A. We moored on, I believe it was, the north side of Pier 90, port side to, stern in.

Q. Captain, could you tell us something about the RALEIGH, what type of vessel she is? A. It is a new type. It is called an amphibious transport dock. The ship is designed to carry about a thousand Marines, up to 108 vehicles, 2800 tons of combat cargo.

Q. Approximately how big is she? A. She is about 560 feet long, as I recall, and about 82 feet in beam.

* * * * *

(9)

Mr. Duggan: Let us go back on the record.

Mr. Klein: The Government will stipulate that Captain Fitzgerald was a Civil Service pilot, regularly employed by the Navy to handle the docking of its ships in the Port of New York.

*Excerpts from Transcript
Deposition of Tracy H. Wilder*

By Mr. Duggan:

Q. When the vessel arrived at Pier 90 on the 17th, did she have any difficulty in going alongside the pier and mooring? A. No, no difficulty.

Q. You do understand, Captain, that the matter that we are concerned with today is that of an alleged collision, which took place on the 18th of August 1966.

Can you describe for us what happened on the 18th of August, what evolution was the RALEIGH engaged in, and generally, what happened? A. As I mentioned earlier, we were moored port side to, stern in, on the north side of Pier 90, on the 17th.

I was informed the following morning that we had to clear that side of the pier and that we were to moor on the south side of the pier, bow in, again port side to.

The Navy again arranged for tugs and pilot, and Mr. Fitzgerald returned on the 18th to do the ship handling. He had three tugs with him, as I recall: a Tracy tug, the (10) KATHLEEN TRACY, to be precise; the BRONX 4; and the Navy YTB.

Fitzgerald's plan was to have the YTB move some camels that were between the RALEIGH and the pier around to the other side, once we had cleared these camels, so we had one tug assigned to moving camels to the other end of the berth.

Mr. Sheinbaum: Note my objection to the testimony as hearsay.

Mr. Duggan: Your objection is noted.

The Witness: We planned to get under way. We set the special detail, and the ship did get under way at about 11:40 on the morning of the 18th.

The current was flooding gently. That is, it was on a diminishing part of the flood current. We

*Excerpts from Transcript
Deposition of Tracy H. Wilder*

estimate the current to be about a knot and a half at that time. It carried the ship away from the pier very gently, so that we were able to get out without the use of a tug.

It had been planned to have the KATHLEEN TRACY come up on the bow of the ship. The superstructure of the ship was such that he claimed he couldn't get up under the bow, and he was told to go and handle camels, and because the current was favorable, we decided we didn't need a tug, and we got under way.

(11)

As we proceeded out into the stream, we had to make a 180-degree turn to come in on the other side. The BRONX 4 was brought up alongside to assist in moving the bow around.

By Mr. Duggan:

Q. Which side was that? A. The starboard side, the starboard bow.

He did come alongside, and he pushed. We got the turn started. Things were working nicely, and there was some confusion; I am not sure what it was. Anyway, the BRONX 4 backed away from the ship.

Pilot Fitzgerald recalled him, and he came in alongside again.

Then, as we commenced our approach on the pier, it was necessary to pass close apert the FRANCE, to compensate for this current that was very noticeably carrying us down on the pier.

As you may note from the chart, if you look at one, there is not much room on that side of the ship [sic slip], so we had to come in very close to the FRANCE. We attempted to do this. The services of the BRONX 4 were

*Excerpts from Transcript
Deposition of Tracy H. Wilder*

essential during about the last four minutes of our approach to move the bow downstream and away from the FRANCE so that we could make our approach.

(12)

I heard the report that the tug was alongside and ready to work after he was recalled. With that, the pilot sounded four blasts on his police whistle, meaning, "Go ahead full," and this was acknowledged on the tug with the ship's whistle.

I observed how we were coming. We seemed to be coming nicely first, but then the bow wasn't moving fast enough in to clear the FRANCE. So, I looked over the side to observe the wake on the tug, noted no wake appearing, which meant he was not pushing.

I pointed this out to the pilot, so he repeated the signal to push ahead full. As I recall the signal was again acknowledged.

I continued to observe the effect, and still the bow wasn't moving as it should have. I looked over the side the second time and found out he wasn't pushing, so this time Fitzgerald leaned over the side and started to talk with the tug captain and tell him to push, orally, without the use of a signal.

With that, the tug began to push. He swung out to about 70 degrees. The bow began to come down nicely. By this time we were within 30 seconds, I would imagine, of collision, and the tug backed away.

So, when he backed away, the pilot put on left (13) full rudder and backed hard on the port engine, but the effect was not soon enough to have prevented this collision.

The RALEIGH struck the FRANCE about by Frame 4 on the RALEIGH. It was a glancing blow, a rather gentle blow.

Then, as we moved down the side of the FRANCE some projections over the side, which were life raft nets

*Excerpts from Transcript
Deposition of Tracy H. Wilder*

that projected over the side, struck the superstructure of the FRANCE, and then the leading corner of a catwalk, which projects out beyond our flight deck, also struck the superstructure of the FRANCE.

The RALEIGH broke away from the FRANCE before it was even up to the midpoint of the FRANCE and went on to make a landing.

Q. Was there more than one striking involved, Captain?

A. As I recall, the bow came in contact, and contact was broken until these projections struck.

* * * * *

(49) * * *

Q. Did Pilot Fitzgerald have the con for the entire operation in which the vessel changed berths? A. That is correct.

Q. Captain, during this shifting operation, what was the YTB doing? A. He was moving camels.

Q. Do I understand correctly that the YTB had as its sole function during the operation moving camels from the north side of Pier 90 to the south side, prior to your coming along the south side? A. This is correct.

Q. Was it your original intent to have the Tracy tug perform this function? A. The selection of which tug did what I left to the pilot.

Q. What was the Tracy tug doing during the shifting operation? A. At one point, she was standing by off our port quarter, and then, to the best of my recollection, once we were clear to the pier and the tug was no longer needed, the KATHLEEN TRACY was told to assist in moving the camels around.

Q. Did she do that? (50) A. She did do that.

Q. The only tug that assisted in moving the RALEIGH was the BRONX 4? A. That is correct.

Q. Do you know, Captain, why the pilot used the BRONX 4 for this function, rather than one of the other

*Excerpts from Transcript
Deposition of Tracy H. Wilder*

tugs, when the communication between the BRONX 4 and the RALEIGH was done with the whistle? A. I don't think—I don't think I can really answer that because this is a pilot's decision. The KATHLEEN TRACY was eliminated because of her superstructure problem. He and I discussed the BRONX 4 working under the bow, and we both felt she could work there.

The YTB was already engaged in moving camels, so it just seemed to me to be, at the time, a wise choice.

* * * * *

(79) * * *

Q. Do you know whether the BRONX ever got a line out to the Dutch bollard? A. I don't know for a fact. All I can say is that, to the best of my recollection, she didn't in Phase 2, but (80) when she came back in Phase 3, I got the report that she was made up and ready to go to work.

Q. Who gave you that report? A. The pilot.

Q. How did he get that? A. I think it was through his oral exchange. He said there was a discussion between the pilot and the skipper of the BRONX 4, where Fitzgerald said, "Line up on that bollard and push," and he said, "I can't do it," and he said, "The hell you can't."

There was an argument over whether he could do it or not, and the outcome was, "O.K., I'll try it."

Q. The communication was that he could not get to that bollard? A. That's right.

Q. The pilot said, "The hell you can't; you can do it," and he said, "I'll try it"? A. That's right.

Q. Precisely what stage was that? A. This was between Phase 2 and Phase 3, after he had broken away and started to leave, and the pilot called him back.

* * * * *

Deposition of George C. McGuirk

(3)

IT IS HEREBY STIPULATED AND AGREED, by and between the attorneys for the respective parties herein, that the sealing, filing and certification of the within deposition be waived; that such deposition may be signed and sworn to before any officer authorized to administer an oath, with the same force and effect as if signed and sworn to before the officer before whom said deposition is taken.

IT IS FURTHER STIPULATED AND AGREED that all objections, except as to form, are reserved to the time of trial.

GEORGE C. MCGUIRK, having been first duly sworn by the Notary Public (Sandra Miaskoff) and stating his residence as 14 Arnold Street, Hicksville, New York, testified as follows:

Examination by Mr. Gargan:

Q. Mr. McGuirk, where are you employed? A. Morania Tanker Corporation.

Q. What is your job? (4) A. Alternate captain.

Q. On what type of vessel? A. On tug MORANIA 3.

Q. As a tug captain, do you go away from home for periods of several weeks at a time and work on board the tug? A. Yes, I do.

Q. How long have you been a tug captain? A. 23 years.

Q. On April 18 [sic. August] 1966, by whom were you employed? A. The Bronx Towing Line.

Q. In what capacity? A. As an alternate captain on the tug BRONX 4.

Q. When did you first begin working for Bronx Towing? A. March 13, 1939.

Q. When did you leave? A. October, 1966.

Q. How long had you been on the BRONX 4 before August 18, 1966? A. Approximately four years.

Deposition of George C. McGuirk

Q. And in 1966, what type of towing did the BRONX 4 normally engage in? A. General harbor.

(5)

Q. Did that include docking ships? A. Yes, and etcetera.

Q. On August 18, 1966, was your tug ordered to assist in the movement of the USS RALEIGH at Pier 90 on North River? A. Yes.

Q. What time were you ordered up to Pier 90? A. We were ordered for 11:00.

Q. What time did you get up there? A. At 11:00 we arrived.

Q. When you arrived at Pier 90, did you communicate with the pilot on the RALEIGH? A. Yes, I did, by radio contact.

Q. And did you maintain radio contact with the pilot during the entire movement? A. No, not after that. The first conversation.

Q. Were you prevented from communicating with the pilot for any reason that you know of? A. Our radio worked fine, but his didn't, to my knowledge, anyhow.

Q. So after the first contact, you weren't able to talk to him? A. No.

Q. Was he able to talk to you? (6) A. No, not at all.

Q. Did you have the wheel when the vessel arrived up at Pier 90? A. Yes, I did.

Q. What, if anything, did the pilot tell you to do when you first arrived? A. My first order was to move a camel from the north side bulkhead to the south side.

Q. Did you do this? A. We had proceeded to do so, yes.

Q. Did you accomplish the mission? A. No. We were relieved by the tug KATHLEEN TRACY.

Q. When you were relieved by the KATHLEEN TRACY, what following order did you get? A. His orders was for me to proceed to the starboard bow of the RALEIGH.

Deposition of George C. McGuirk

Q. Who gave you that order? A. The tug KATHLEEN TRACY.

Q. Do you know who initiated the order? A. I would assume, the pilot on the ship.

Q. Did you go to the starboard bow of the RALEIGH?
A. We tried to, but we were unable to get in (7) position on account of the overhang of the ship.

Q. Where was the RALEIGH, when you attempted to get under her bow? A. She was moving out of the slip.

Q. Did you tell the pilot that you were unable to make up to the starboard bow of that vessel? A. I talked to him by my bullhorn, and told him I was unable to get to the place that he appointed me to and that I would try to get in position somewhere else on the ship.

Q. Where did you finally get in position? A. Chocked right underneath the bridge.

Mr. Gargan: At this point, I would like to mark a booklet of General Plans for a Vessel, LPD 1, which is the USS RALEIGH.

(Booklet marked Defendant and Third-Party Plaintiff's McGuirk Exhibit 1, for identification, as of this date.)

Q. Mr. McGuirk, I show you Government's Exhibit 1, and Page—or a leaf of that booklet entitled, "The Outboard Profile," and ask you to indicate where you first attempted to make up to the cleat.

Mr. Ryan: Could we look at that before he answers?

(8)

Mr. Gargan: Yes.

Q. Mr. McGuirk, if you would respond to my last question, which was to identify the place where you first

Deposition of George C. McGuirk

attempted to make up to the bow of the vessel, if you can?

A. I proceeded to make up to the bulk cleat on the starboard bow, but was unable to do so because of the overhang.

Q. With a pen, would you draw an arrow and label that "A"? A. Okay.

Mr. Gargan: And we all agree that A is the place where he first attempted to make up?

Mr. Read: Agreed.

Q. Mr. McGuirk—A. Unable to get into this position, after communicating with the pilot by bullhorn, I proceeded to the following chock just below the bridge.

Q. Would you mark that with a "B"? A. Yes, marked B.

Q. And that's where you got a line on the RALEIGH?

A. That's where I got the line out, right.

Q. Where was the line leading from your vessel (9) to this recessed chock? A. That would be out in a straight line.

Q. Was it leading off the bow? A. Right off the bow, off the stem.

Mr. Ryan: He said after he was made up. I didn't hear him say that he had secured the line.

The Witness: I had secured the line.

Q. After you made up, did you get an order from the pilot? A. I got an order from the pilot for a full ahead on both engines.

Q. And how did he give you that order? A. By hand whistle.

Q. Did you respond? First of all, did you respond with the engines? A. I responded with the engines and then I gave him the indication that I heard him, with my whistle.

Deposition of George C. McGuirk

Q. Did you have any difficulty in responding to the order, insofar as the movement of the ship was concerned?

A. Well, I was unable to get my tug in position (10) the way I would want to, yes, the ship was moving a little fast.

Q. Now, did you communicate this difficulty to the pilot? A. I tried to, yes.

Q. And did he acknowledge your communication? A. No. He was on the other side of the bridge, so I was unable to contact him.

Q. Now, where is the radio located on the bridge of the BRONX 4? A. The radio is right directly over your head.

Q. When you are standing? A. Right.

Q. Where? A. In the pilot house right behind the wheel.

Q. Now, if radio communications with the pilot had been operating properly, would you have been able to communicate to the pilot, this difficulty you were having without leaving the wheel? A. Yes, I would.

Q. And in the absence of that radio communication, you couldn't communicate with him; is that correct? A. That's correct.

* * * * *

Deposition of Mervine Steen

IT IS HEREBY STIPULATED AND AGREED by and between the proctors for the respective parties hereto, that all objections except as to the form of the question shall be reserved to the time of the trial;

IT IS FURTHER STIPULATED AND AGREED that signing, certification and filing shall be and the same are hereby waived.

MERVINE STEEN, having been duly sworn by the Notary Public, testified as follows:

Direct examination by Mr. Wood:

Q. What is your name? A. Mervine Steen.

Q. What is your home address? A. Right now it is 670 Norwood Drive, West Hempstead.

Q. Whom are you now employed by? A. Bronx Towing Lines.

Q. How long have you been with Bronx Towing Lines?
A. Fifteen years.

(4)

Q. Are you assigned to any particular tug? A. Yes.

Q. Which one? A. Tug BRONX 4.

Q. What is your position on the BRONX 4? A. Captain.

Q. How long have you been captain on her? A. I have been on her now five years.

Q. What are the dimensions of the BRONX 4? A. 75 feet long, and she is approximately 24, 25 feet wide.

Q. What horsepower does she have? A. Now or then?

Q. When you speak of then, what do you mean—the time of the collision? A. The time of the collision.

Q. What was her horsepower then? A. Her horsepower then, she was 15, 1600.

* * * * *

Deposition of Mervine Steen

(10) * * *

Q. Where did you go when you finished your lunch?

A. I went up in the wheelhouse, on watch.

Q. And when you finished your lunch where was the BRONX 4 with relation to the RALEIGH? A. She was out in the stream.

Q. You were not then, I gather, up in the wheelhouse during the time that the RALEIGH was moved from the north side of Pier 90? A. No.

Q. When she was out in the stream was the BRONX 4 still alongside the RALEIGH? A. We were riding alongside, yes.

Q. I wonder if you could indicate on the chart, this Exhibit 1 for identification, about where the RALEIGH was when you took over the watch? A. That is very difficult because you don't go looking around where you are half the time, you just go up to the job, you ain't looking in perspective of where you are.

I only know we were out in the stream some place when I come up on watch, I would say approximately somewhere here (marking chart).

(11)

Q. You have drawn an outline of the RALEIGH. Maybe you could put a "R" in that. A. (Marking chart) And the tug was about here.

Mr. Wood: Witness marks the word "Tug" in the outline of the tug.

Q. At that time did you have a line to the RALEIGH? A. No.

Q. Were there any other tugs that you noticed in the vicinity at that time? A. No.

Q. What engine order was the tug under when you took

Deposition of Mervine Steen

over the watch? A. She wasn't made fast yet, she was ordered to make fast at the bow.

Q. Were the engines moving ahead or was she stopped?
A. We were moving ahead with the ship.

Q. How fast do you think the ship was moving? A. Like I said, coming into the wheelhouse at that time, not taking much chance to look around you don't notice these things right away.

Coming alongside the ship the mate told (12) me he wants to get a line on the bow. I said "All right, we will get up there and get a line on the bow" and I moved the tug up to try to get a line on the bow.

Q. Were you able to get one? A. No sir.

Q. Why was that? A. The overhang of the ship was too steep for me to get my tug under there and at the time the mate told me that there was no radio connection between the pilot and us for some reason.

Q. No radio connection at all? A. He said we were working on whistles, and I couldn't get the line on. I yelled up to him there, a loudspeaker I have on the tug, that I couldn't get the line on. I yelled up to him because of the overhead, and he said "You got to get a line on there" or something to that effect and I told him I would try to get one back on the next one, it was the best I could do, and I dropped back and at the time I dropped back to get a line there he gave me a whistle signal for full ahead, which when I got the tug to the ship, alongside the ship, I acknowledged, and I gave him a whistle with (13) full ahead.

Q. Was this before you had a line on? A. This was before I had a line on. Meantime I am still trying to get my line on.

Deposition of Mervine Steen

Q. Incidentally, what was the state of the tide? A. The tide was just the last of the flood.

Q. What was the strength of the current? A. Well, the strength was no more than two knots, one and a half, two knots at the most.

Q. Was there any wind? A. No wind.

Q. What kind of a bow fender do you have, or did you have then? A. We had a good bow fender.

Q. Was it rubber? A. Rope, with tires underneath it to fill it out.

Q. Were any of the windows in the pilothouse open? A. Yes, the windows were open.

Q. So you could hear the whistle signals without any trouble from the ship? A. That's right.

STATE OF NEW YORK
COUNTY OF NEW YORK

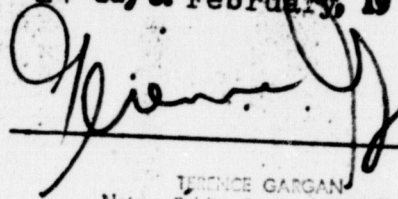
Patricia Miller
that deponent is not a party
That on the 24th day of February
Brief and Appended
United

upon the attorney(s) for the
two

by depositing a true copy the
maintained by the United States
battan, City of New York, and
Messrs. McHugh, Heck
Messrs. Martin & Ryan
Messrs. Hill, Betts

that being the address design

Sworn to before me this
24 day of February, 19



TERENCE GARGAN
Notary Public, State of New York
No. 6142583
Qualified in Westchester County
Commission Expires March 30, 19

AFFIDAVIT OF SERVICE BY MAIL

ss.:

, being duly sworn, deposes and says;
to this action and is over 18 years of age.
Feb. 19 75, deponent served the within
x of Defendant and Third-Party Plaintiff-Appellant,
d States of America
Plaintiff and Third-Party Defendants
ereof securely enclosed in a franked wrapper, in a post office box regularly
tes Post Office Department at 26 Federal Plaza, in the Borough of Man-
dressed to said attorney(s) as follows:
kman, Smith & Leonard, 80 Pine Street, N.Y., N.Y. 10005
an, 79 Wall Street, N.Y., N.Y. 10005
& Nash, One World Trade Center, Suite 5215, N.Y.N.Y.
10048
ated by said attorney(s) for that purpose.

Patricia Miller

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